

# TRUST AGREEMENT TO DEMONSTRATE LIABILITY COVERAGE

Trust Agreement, the "Agreement," entered into as of \_\_\_\_\_ by and between  
(date)

\_\_\_\_\_ a \_\_\_\_\_,  
(name of owner or operator) (Name of State (insert "corporation," "partnership,"  
association," or "proprietorship"))  
the "Grantor," and \_\_\_\_\_,  
(name of corporate trustee) (insert "incorporated in the State of"  
"or "a national bank")  
the "Trustee."

Whereas, the Kentucky Energy and Environment Cabinet, an agency of the Commonwealth of Kentucky, has established certain regulations in 401 KAR Chapters 30 to 38 applicable to the Grantor, requiring that an owner or operator of a hazardous waste site or facility or group of facilities must demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental and/or nonsudden accidental occurrences arising from operations of the facility or group of facilities.

Whereas, the Grantor has elected to establish a trust to assure all or part of such financial responsibility for the facilities identified herein.

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this Agreement, and Trustee is willing to act as trustee.

Now, therefore, the Grantor and the Trustee agree as follows:

## **Article 1. Definitions.** As used in this Agreement:

- (a) The term "Grantor" means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor.
- (b) The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.
- (c) The term "Cabinet" means the Kentucky Energy and Environment Cabinet.

**Article 2. Identification of Facilities.** This Agreement pertains to the facility or facilities identified on attached Schedule A. *(Schedule A must be attached and completely filled out with the following information for each facility: EPA Identification Number, name and address of each facility and the amount of liability coverage, or portions thereof, if more than one instrument affords combined coverage as demonstrated by this Agreement.)*

**Article 3. Establishment of Fund.** The Grantor and Trustee hereby establish a trust fund, hereinafter the "Fund," for the benefit of any and all third parties injured or damaged by

\_\_\_\_\_ accidental occurrences arising from operation of the facility(ies) covered by  
(insert "sudden," "nonsudden" or  
"both sudden and nonsudden")  
this guarantee, in the amounts of \_\_\_\_\_ per occurrence and

\_\_\_\_\_ (insert dollar amount of coverage)  
annual aggregate for sudden accidental occurrences and  
(insert dollar amount of coverage)  
\_\_\_\_\_ per occurrence and \_\_\_\_\_ (insert dollar amount of coverage)

annual aggregate for nonsudden occurrences, except that the Fund is not established for the benefit of third parties for the following:

- (a) Bodily injury or property damage for which \_\_\_\_\_ is obligated to  
(insert Grantor)  
pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that \_\_\_\_\_ would be obligated to pay in the absence of  
(insert Grantor)  
the contract or agreement.

(b) Any obligation of \_\_\_\_\_ under a workers' compensation, disability benefits, or unemployment compensation law or any similar law.  
(insert Grantor)

(c) Bodily injury to:

(1) An employee of \_\_\_\_\_ arising from, and in the course of, employment by \_\_\_\_\_; or  
(insert Grantor)

(2) The spouse, child, parent, brother or sister of that employee as a consequence of, or arising from, and in the course of employment by \_\_\_\_\_.  
(insert Grantor)

This exclusion applies:

(A) Whether \_\_\_\_\_ may be liable as an employer or in any other capacity; and  
(insert Grantor)

(B) To any obligation to share damages with or repay another person who must pay damages because of the injury to persons identified in paragraphs (1) and (2).

(d) Bodily injury or property damage arising out of the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle or watercraft.

(e) Property damage to:

(1) Any property owned, rented, or occupied by \_\_\_\_\_  
(insert Grantor)

(2) Premises that are sold, given away or abandoned by \_\_\_\_\_ if the property damage arises out of any part of those premises;  
(insert Grantor)

(3) Property loaned to \_\_\_\_\_;  
(insert Grantor)

(4) Personal property in the care, custody or control of \_\_\_\_\_  
(insert Grantor)

(5) That particular part of real property on which \_\_\_\_\_ or any contractors or subcontractors working directly or indirectly on behalf of \_\_\_\_\_ are performing operations, if the property damage arises out of these operations.  
(insert Grantor)

In the event of combination with another mechanism for liability coverage, the Fund shall be considered \_\_\_\_\_ coverage.  
(insert "primary" or "excess")

The Fund is established initially as consisting of the property, which is acceptable to the Trustee, described in Schedule B attached hereto. Such property and any other property subsequently transferred to the Trustee is referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor established by the Cabinet.

**Article 4. Payment for Bodily Injury or Property Damage.** The Trustee shall satisfy a third party liability claim by making payments from the Fund only upon receipt of one the following documents:

(a) Certification from the Grantor and the third party claimant(s) that the liability claim should be paid. The certification shall be worded as follows:

#### **CERTIFICATION OF VALID CLAIM**

The undersigned, as parties \_\_\_\_\_ and \_\_\_\_\_  
(insert Grantor) (insert name and address)  
\_\_\_\_\_ hereby certify that the claim of bodily injury and/or  
(of third party claimant(s))

property damage caused by a \_\_\_\_\_ accidental occurrence arising from operating  
\_\_\_\_\_ *(sudden or nonsudden)* hazardous waste treatment, storage, or disposal facility should be paid in  
\_\_\_\_\_ *(insert Grantor)*  
the amount of \$ \_\_\_\_\_ .

\_\_\_\_\_  
*(Signature(s) of Grantor)*

\_\_\_\_\_  
*(Name(s) of Grantor, type*

\_\_\_\_\_  
*(Signature(s) of Claimant)*

\_\_\_\_\_  
*(Name(s) of Claimant typed)*

(b) A valid final court order establishing a judgement against the Grantor for bodily injury or property damage caused by sudden or nonsudden accidental occurrences arising from the operation of the Grantor's facility or group of facilities.

**Article 5. Payments Comprising the Fund.** Payments made to the Trustee for the Fund shall consist of cash or securities acceptable to the Trustee.

**Article 6. Trustee Management.** The Trustee shall invest and reinvest the principal and income of the Fund, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Article. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge his duties with respect to the Trust Fund solely in the interest of the beneficiary and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims, except that:

(a) Securities or other obligations of the Grantor, any other owner or operator of the facility or facilities, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-2.(a), shall not be acquired or held, unless they are securities or other obligations of the Federal or a state government;

(b) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or a state government; and

(c) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

**Article 7. Commingling and Investment.** The Trustee is expressly authorized in its discretion:

(a) To transfer from time to time any or all of the assets of the Fund to any common, commingled or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

(b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

**Article 8. Express Powers of Trustee.** Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;

(b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with

certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or a state government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

**Article 9. Taxes and Expenses.** All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Trust Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust Fund, including fees for ordinary and necessary legal services rendered to the Trustee, the compensation of the Trustee (to the extent not directly paid by Grantor), and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

**Article 10. Annual Valuations.** The Trustee shall annually, at least thirty (30) days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the Director of the Division of Waste Management in the Cabinet a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than sixty (60) days prior to the anniversary date of establishment of the Fund. The failure of the Grantor to object in writing to the Trustee within ninety (90) days after the statement has been furnished to the Grantor and the Director of the Division of Waste Management in the Cabinet shall constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

**Article 11. Advice of Counsel.** The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

**Article 12. Trustee Compensation.** The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

**Article 13. Successor Trustee.** The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in a writing sent to the Grantor, the Director of the Division of Waste Management in the Cabinet and the present Trustee by certified mail ten (10) days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Article shall be paid as provided in Article 9.

**Article 14. Instructions to the Trustee.** All orders, requests, certificates of valid claims, and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in the attached Exhibit A or such other designees as the Grantor may designate by amendment to Exhibit A. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests and instructions. All orders, requests and instructions by the Director of the Division of Waste Management in the Cabinet to the Trustee shall be in writing and shall be signed by the Director of the Cabinet's Division of Waste Management or the Secretary of the Energy and Environment Cabinet or their designees, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or the Cabinet hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or the Cabinet, except as provided for herein.

**Article 15. Notice of Nonpayment.** If a payment for bodily injury or property damage is made under Article 4 of this trust, the Trustee shall notify the Grantor of such payment and the amount(s) thereof within five (5) working days. The Grantor shall, on or before the anniversary date of the establishment of the Fund following such notice, either make payments to the Trustee in amounts sufficient to cause the trust to

return to its value immediately prior to the payment of claims under Article 4, or shall provide written proof to the Trustee that other financial assurance for liability coverage has been obtained equaling the amount necessary to return the trust to its value prior to the payment of claims. If the Grantor does not either make payments to the Trustee or provide the Trustee with such proof, the Trustee shall within-ten (10) working days after the anniversary date of the establishment of the Fund provide a written notice of nonpayment to the Director of the Division of Waste Management in the Cabinet.

**Article 16. Amendment of Agreement.** This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the Director of the Division of Waste Management in the Cabinet, or by the Trustee and the Director of the Division of Waste Management in the Cabinet if the Grantor ceases to exist.

**Article 17. Irrevocability and Termination.** Subject to the right of the parties to amend this Agreement as provided in Article 16, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the Director of the Division of Waste Management in the Cabinet, or of the Trustee and the Director of the Division of Waste Management in the Cabinet if the Grantor ceases to exist. Upon termination of the Trust, all remaining Trust property, less final trust administrative expenses, shall be delivered to the Grantor.

The Cabinet will agree to termination of the Trust when the owner or operator substitutes alternate financial assurance as specified in this Agreement and 401 KAR 34:120 or 35:120.

**Article 18. Immunity and Indemnification.** The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the Director of the Division of Waste Management in the Cabinet issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

**Article 19. Choice of Law.** This Agreement shall be administered, construed, and enforced according to the laws of the Commonwealth of Kentucky.

**Article 20. Interpretation.** As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each Article of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness Whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals to be hereunto affixed and attested as of the date first above written.

The parties below certify that the wording of this Agreement is identical to the wording specified in 401 KAR 34:080 as such regulations were constituted on the date first above written.

By \_\_\_\_\_  
(Signature of Grantor)

\_\_\_\_\_  
(Title, typed)

Attest: \_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Title, typed)

(Seal)

By \_\_\_\_\_  
(Signature of Grantor)

\_\_\_\_\_  
(Title, typed)

Attest: \_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Title, typed)

(Seal)

## Certification of Acknowledgment

State of \_\_\_\_\_

County of \_\_\_\_\_

On this \_\_\_\_\_ before me personally came \_\_\_\_\_  
(date) (owner or operator)

to me known, who, being by me duly sworn, did depose and say that she/he resides at \_\_\_\_\_

, \_\_\_\_\_ dress)  
that she/he is \_\_\_\_\_ of \_\_\_\_\_ ,  
(title) (corporation)

the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that she/he signed her/his name thereto by like order.

\_\_\_\_\_  
(Signature of Notary Public)

\_\_\_\_\_  
(Date Notary Public Commission Expires)

(Seal of Notary Public)

**Trust Fund Schedule B**

GRANTOR'S FACILITY NAME \_\_\_\_\_

\_\_\_\_\_  
*(Grantor's Name)*

\_\_\_\_\_  
*(Facility Name)*

\_\_\_\_\_  
*(Facility's EPA Identification Number)*

\_\_\_\_\_  
*(Street Name)*

\_\_\_\_\_  
*(City, State, Zip)*

\_\_\_\_\_  
*(Amount of Sudden Liability Coverage)*

\_\_\_\_\_  
*(Amount of Nonsudden Liability Coverage)*

## Trust Fund Schedule B

The fund consists of \$ \_\_\_\_\_ .

## **Trust Fund Exhibit A**

GRANTOR'S FACILITY NAME \_\_\_\_\_ .

The following is a list of all persons who are authorized by the Grantor to give orders, requests, and instructions to the Trustee:

DEP-6035P, effective 2/10/94

(Note: the use of this form is required by 401 KAR 34:080)